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Issue Date: 01 June 2006

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In the Matter of

ALBERT STEWARD
Claimant
v.
CONTAINER MAINTENANCE
Employer
And
ARM INSURANCE SERVICES
Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
……..

Case No. 2005 LHC 00854
OWCP No. 6-190572

Decision and Order

This matter arises pursuant to a claim for medical benefits and other relief under the Longshore Act filed by Albert Steward of Jacksonville, Florida. On February 11, 2003, while working as a chassis repairman, Claimant injured his left elbow when he fell ten feet from a scaffold onto a concrete floor, landing on his left side. He was taken to the emergency room where he was treated for a head wound and hip and buttock pain. The hospital diagnosis was head contusion, cephalgia, and left low back contusion and strain. Hospital records do not reflect that Claimant complained of left arm pain or received left arm treatment, but Claimant contends that he did complain and did receive treatment for his left arm. He explains, however, that the laceration of his head was the hospital's primary concern. Tr. 21-22. The next day, Claimant received follow-up treatment at the offices of Dr. Robert Chapa where he was diagnosed with head laceration and low back joint pain. Tr. 22.

In this proceeding, Claimant alleges that he injured his left elbow in the accident but his Employer denied his request for medical treatment of that injury.

He, therefore, seeks medical benefits, including recovery of expenses for an MRI of his left elbow injury. He also claims that Dr. Chapa was designated by Employer and was not his choice of physician. He, therefore, seeks an order granting him right to see a physician of his choosing. Tr. 21. Finally, Claimant seeks no compensation for any period after he was released to return to work by Dr. Chapa, Tr. 9, but believes he is entitled to additional compensation on benefits paid based upon an adjustment in his average weekly wage. The parties agree that annual wages and vacation and holiday pay and container royalties on must be included in the average weekly wage (AWW) calculation but they disagree on the divisor; Claimant divides his annual wages by 34 alleging an average weekly wage of $1251.87, Tr. 12; and Employer divides by 52, claiming his average weekly wage is $818.54. Tr. 29, Tr. 31-32, Jt. Ex. 13, 14. In response to Claimant's other assertions, Employer argues that Claimant did exercise his choice of physician and selected Dr. Chapa, and contends further that Claimant's elbow condition is not related to the accident at work. Tr. 35-36.

Findings of Fact

Claimant testified that he was treated in the emergency room for his head and back injuries, he was told that if he wanted follow-up treatment he had to sign the forms the carrier gave him, and he did. Tr. 43-44. He recalled signing a physician of choice form on February 17, 2003, but, he testified that no physician was identified on the form at the time. Tr. 44, 90; JX 5. He denied that he knew Dr. Chapa or wrote in Dr. Chapa's name on the form. Tr. 44-45; Tr. 125. According to Claimant, the carrier told him to go to Dr. Chapa, and Dr. Chapa's name was written in later by someone else. Tr. 45; Tr. 89-90. He maintains that saw Dr. Chapa because he understood that he had to see him, Tr. 91-92, and testified that he did not understand that he had an option from the outset to go to someone else. Tr. 92.

At Dr. Chapa's office, an assistant provided his care and treatment. Tr. 45. He saw Dr. Chapa a few times, Tr. 46; once when Dr. Chapa was releasing him to return to work. Tr. 46. Claimant testified that, during his visits to Dr. Chapa's office, he did complain about his arm, and he was given a padded brace. Tr. 47-48. Claimant testified that he told Dr. Chapa's office about his elbow pain at every visit, Tr. 87, and also insists that he told the doctors at the emergency room. Tr. 87-88.

Claimant testified that Dr. Chapa did not examine him before March 18, 2003, Tr. 88, but on other occasions would enter the room and stay only two or three minutes. Tr. 122. Claimant acknowledged, however, that Dr. Chapa did eventually examine his arm. Tr. 46-47. Claimant did not disagree when Dr. Chapa returned him to full duty as a container repair mechanic, Tr. 82, and he acknowledged that the work he performed required the use of both arms. Tr. 83. Claimant does not contend that the elbow injury has ever stopped him from working. Tr. 120, 129-30.

After he was released by Dr. Chapa, Claimant tried, he testified, to go back to Dr. Chapa for treatment of his elbow. He testified that he asked his employer's for approval to see Dr. Chapa, Tr. 49, but claims could not get Employer's approval, Tr. 48-49; 99, 103. He testified further that Dr. Chapa's office advised that him that he needed further authorization to return for elbow treatment after he had been released. Tr. 98.

Claimant explained that his goal after the accident was to get his ten years of ILA credit so he could retire, and he was concerned that if he sought treatment under worker's compensation without Employer's approval and the provider contacted the Employer, he would be terminated. Tr. 99. Claimant therefore went to his family doctor, but his family doctor denied him treatment because he did not handle worker's compensation cases. Tr. 49. He then went to Dr. Mella, and Dr. Mella ordered the MRI about five months after the accident. Tr. 49-50. Claimant was working during this period, but had no other accidents. Tr. 50. He claims he had no prior left arm injury. Tr. 50. He currently experiences intermittent arm pain, and, on occasion, his arm "goes dead. " Tr. 53, 85-86. Claimant has not received an orthopedic evaluation. Tr. 54.

Claimant's health insurance carrier paid for the MRI and eventually sent him a letter accusing him of fraud on the ground that the elbow injury was work-related. Tr. 51. As a result of that letter, Claimant contacted an attorney. Tr. 51.

The record shows that Claimant owns his own business, dba, Early and Al's Fencing and Rails, Inc. The company is a steel fabrication business that makes fences, security doors, and burglar bars for private and commercial uses, and Claimant serves as the company's president, Tr. 55, and its only salaried employee. Tr. 59. Claimant is a hands-on CEO. Tr. 58. He works the equipment, welds scrolls, fabricates product, and works as an installer. Tr. 58-59. Early and Al's main activity is installing fences for City of Jacksonville. Tr. 59.

Early and Al's was a profitable venture before Claimant's accident. Tr. 59, 65-66. Claimant ran the business himself with occasional help from his two sons. Tr. 59-60. According to Claimant, he had a "patent" (in the sense that he had somewhat of a corner on the market) on burglar bars. Tr. 66. At his deposition, Claimant attributed the success of his business to his own activity. Tr. 67. Claimant was able to offset the loss of income from lay offs from his job as a chassis repairmen with income from his own business. Tr. 67.

Claimant believes he can earn as a much from his own business as he earns as a longshoreman. Tr. 68. "I'm a person," he testified, "that has a schedule of when I'm going to leave ILA so right now, I had to be at Container Maintenance." At the time, Claimant needed two more years of work to qualify for retirement. Tr. 68-9, 77, 120. His goal was to retire from the ILA to concentrate on his own business. Tr. 110-111.

At Container Maintenance, Claimant usually worked Monday through Friday, 8 hours each day with some overtime. Tr. 60. In the two year period Claimant worked at Container Maintenance prior to the accident, his business at Early and Al's was occasionally shut down, Tr.60-61, and occasionally he employed part-time help to work while he was working at Container Maintenance. In the two years preceding the accident, Claimant worked about six months at Container Maintenance and six months at Early and Al's, but the work was not continuous at either. He went back and forth from time to time. Tr. 61-62. Claimant testified that Container Maintenance hired him as a fulltime worker. Tr. 69, but the record indicates that he was a temporary worker. Tr. 75. He testified that he always presented to the union bench for work, but some days he would be bumped by co-workers with higher seniority. Tr. 62-63; Tr. 79; Tr. 125.

Prior to his accident, Claimant received a letter about poor work performance. Tr. 64. He denied that it had anything to do with the hours he needed to run his own company, Tr. 64, but he was suspended for a day for attendance problem prior to his accident. Tr. 64.

Claimant acknowledged that he had to work at least 1000 hours from October to October from year to year or he would lose his pension and welfare benefits. Tr. 70, 72. He was injured on February 11, 2002. From October 1, 2001 to the date of his accident, he had already earned his 1000 hours that qualified him for pension and welfare benefits. Tr. 73-74. In the year preceding the accident, Claimant had earned his 1000 hours. Tr. 71.

After the accident, Claimant worked full time for Container Maintenance. Tr. 69. When he was not working for Container Maintenance, however, he often worked at Early and Als' where he could work part-time at his option. Tr. 71. From May 12, 2002 to June 9, 2002, Claimant believes he was on vacation. Tr. 76. He was also off from July 28, 2002, through October 27, 2002. Tr. 74, 76. Claimant testified that he was bumped during the latter period, and he may have worked at Early and Al's. Tr. 76.

From July 28, to October 27, 2002, Claimant was considered casual labor. Tr. 74. During the six month period prior to the accident, Claimant worked a 40-hour week twice. During the other weeks, he worked fewer hours. Tr. 78. After the accident he was suspended for 40 hours with his union's acquiescence for missing work. Tr. 100. He eventually returned to a different facility where he was allowed to work part-time. Tr. 100, 119. Claimant was on the verge of receiving another suspension for missing work when he resigned from Container Maintenance. Tr. 101.

The record contains different 2003 tax returns for Claimant. Ex 3.; Tr. 105. The tax returns were prepared by a tax preparer. Tr. 106.

The deposition of Fred Wakefield, a member of Local 1408's Executive Board, was entered into evidence at the hearing. JX 18. According to Wakefield, the union maintains a daily sign-in log, or book, that keeps track of members who report to the bench to work each day. Pg. 9-10. It shows "anyone that made themselves available…. If there is no work, it logs that they were there seeking work." Pg. 10. "The members that are available are the ones that signed." Pg. 13. Some members may work without signing if they received a referral or if the labor order called for the dispatch of everyone on the bench. Pg. 13. In some situations, a member may be available who has not signed up, and the union may contact him by letter. Pg. 15. A member may call in and be told no work is available, and that may be an excuse for not signing in, but Wakefield testified that it should not deter an available worker because other employers can submit labor orders during the day. pg. 49-50. For the period, July through October 2002, Claimant had a gap in his employment when he did not present to the bench and sign-in. pg 22. The book does not show the reason he did not make himself available, Pg. 22-23, but by not signing the log, Wakefield testified, Claimant was not making himself available for work. Pg. 25-26.

Ray Nelson, Employer's General Manager, testified at the hearing. Tr. 134. He explained that after the accident Claimant worked sporadically, Tr. 136, and he

took action under the port-wide attendance policy. Tr. 136. At the time, all of Claimant's absences were unexcused. Tr. 138. If he was off work for medical reasons and filed a leave slip, the absence could be excused, Tr. 152, but he insisted that Claimant never requested that he be sent back to Dr. Chapa, Tr. 137-138, and he first heard that Claimant wanted additional medical treatment after his resignation on July 26, 2004. Tr. 137, 149.

The record shows that during the 52 weeks prior to the accident, Claimant was hired on a daily, casual basis from the union hall. Tr. 140. Prior to the accident, Claimant was not guaranteed a 40 hour work week. Tr. 140. He was hired based on workload and union seniority, Tr. 140, and his employment was intermittent or discontinuance. Tr. 142. Nelson explained that to work, Claimant would first have to make himself available by presenting himself to the bench. Tr. 143. During this 52 week period, work was available, but Nelson did not know why Claimant did not work during certain weeks. Tr. 142-43, 147-48.

Nelson confirmed that if a worker has minor injuries on-site the worker is expected to go to Dr. Chapa, Tr. 144, but he denied that Employer insisted that Claimant see Dr. Chapa. Tr. 153-55. He further denied that he had ever denied any worker medical treatment who requested it. In every case, he testified that he notifies the carrier of the request. Tr. 145, 158-60. Claimant testified that he was concerned that if he advised the company that he needed medical treatment disciplinary action would have been taken. Nelson denied that any action would have been taken, Tr. 145, and he denied that he knew that Claimant wanted treatment for his elbow or that he was having any difficulty performing his job. Tr. 146.

Carey Kilgore, the carrier's adjuster, also testified at the hearing. Tr. 161. Kilgore confirmed that Claimant was paid temporary total disability benefits from February 12, 2003, through March 25, 2003. Tr. 171. He clarified that this claim was originally handled by his predecessor, Jose Duvalle. Tr. 163, 176. Kilgore described the carrier's process for handling claims, and he believes Duvalle followed it. Tr. 164. His file shows that Claimant signed the choice of physician form on February 17, 2003, designating Dr. Chapa. Tr. 164-65. He explained that the choice of physician form is not pre-filled out with the name of the doctor. Tr. 165-66. He did not recognize the handwriting that designates Dr. Chapa as the physician of choice on Claimant's form, Tr. 177, but he acknowledged that Duvalle could have had Claimant sign the form in blank, Tr. 178, and further acknowledged that Duvalle is no longer employed by the carrier due, in part, to "ineffective" handling of claims. Tr. 178.

Kilgore found no indication in his file that Claimant requested follow-up treatment after he was released to return to work. Tr. 167. He received no request for payment from Dr. McCue or Dr. Mella, Tr. 169, and testified they were not authorized to provide treatment. Tr. 169.

Medical Evidence

Emergency room records indicate that, as a result of the February 11, 2003 accident, Claimant was treated for a head laceration and back pain. There is no report of pain in the elbow and examination notes state: "Musculoskeletal: Good range of motion in all extremities. No obvious deformities." JX 1. Elevn days later, claimant sought treatment from Dr. Chapa.

Dr. Chapa was deposed on August 31, 2005. JX 4. Dr. Chapa practices occupational medicine, Dep. at 4, and is Board-eligible in emergency medicine. Dep. at 6. He has twenty years of experience treating patients with orthopedic problems. Dep. at 7-8. He testified that he first saw Claimant on February 12, 2003. Dep. at 11. On an intake form, Claimant indicated that he had injured his head and back. Dep. at 13-16.

Although Dr. Chapa testified at his deposition that he performed a physical on February 12, 2003, Dep. at 16, and again on February 14, 2003. Dep. at 21, he later clarified that during the first visit, Claimant was seen by Randy Heath, Dr. Chapa's physician's assistant. Dep. at 52-53. Dr. Chapa may or may not have been in the room, and he may not have examined Claimant. Mr. Heath discussed his findings with Dr. Chapa, Dep. at 43, but Dr. Chapa was not sure whether he performed the physical examination on February 14, 2003, February 21, 2003, March 5, 2003. He explained that he sometimes performs the examinations and the assistant writes them up, but he is unsure what transpired on these occasions with Claimant. Dep. at 51, 53-54, 61.

For the first several visits, Dr. Chapa testified that Claimant did not report elbow pain. Dep. at 18. Dr. Chapa believes that had Claimant reported elbow pain it would have been noted by the medical assistant who took the medical history and symptoms reports. Dep. at 18, and 62. Dr. Chapa noted further that physical therapy records revealed no complaint of elbow pain. Dep. at 29. Again the examinations focused on the areas of complaint involving the head and low back. Dep. at 21. Claimant returned for treatment several times, but Dr. Chapa testified that the first time he mentioned his left elbow was during a visit on March 18,

2003. Dep. at 26-27, 33. According to Dr. Chapa, his office notes on that date did mention that there was "still" a deformity that moves, but no pain. Dep. at 26-27, 62, and attachments. Use of the word "still" when referring to the elbow deformity could, Dr. Chapa agreed, be interpreted as a reference to ongoing complaints. Dep. at 62, 64. The notes further mention a small cyst in the left elbow. Dep. at 27 and attachments. Dr. Chapa could not recall whether or not he performed the March 18, 2003, examination.

Claimant returned to Dr. Chapa's office on April 10, 2003, and again complained of left elbow pain. On April 24, 2003, Claimant reported that he thought his elbow was broken, Dep. at 31-32, and Dr. Chapa ordered an x-ray of the left elbow which indicated "no acute fracture or dislocation…" Dep. at 32. Dr. Chapa indicated that Claimant reached maximum medical improvement on May 15, 2003, Dep. at 34, with no impairment. Dep. at 35. In Dr. Chapa's opinion, Claimant needed no further medical treatment related to the fall. Dep. at 37. After April 24, 2003, Dr. Chapa confirmed that Claimant did not return for follow-up visits although Dr. Chapa testified he was authorized to return if needed. Dep. at 37-38.

Dr. Chapa testified that Claimant had an opportunity to mention his elbow pain on numerous occasions to many different receptionists nurses, medical assistant's, and none recorded an elbow complaint until March 18, 2003. Dep. at 66-67, 81. For the April 24, 2003, exam, Dr. Chapa believes he was "probably there." Pg. 67-69. Dr. Chapa ordered the x-ray. Dep. at 70. His chart shows another chart for "Coastal Medical, Inc. with a diagnosis of "contusion of the elbow" and that an elbow protector was provided to Claimant. It was provided the same day the x-ray was taken and was prescribed when Claimant complained of the elbow problem. Dep. at 78-79 and attachments.

A July 3, 2003 MRI was interpreted by Dr. Griffiths as revealing a small, minimally displaced fracture at the tip of the coracoid process in his left elbow. JX 2

Dr. Chapa explained that this MRI showing a fracture of the left elbow is a problem distinct from the loose body in the elbow. In his opinion, the MRI findings are not consistent with the history or the physical findings that Dr. Chapa's office reported. Dep. at 74. In Dr. Chapa's opinion, if an individual falls and fractures his elbow, it is very painful on the day of the injury, and would be notable by many people subsequently. Dep. at 75. In his opinion, the MRI indicates that the fracture is a new injury, Dep. at 76, and the chance that the fracture

occurred on February 11, 2003, is "one in million," because there is no clinical evidence of it, no subjective or objective evidence of it, and no history of it reported by multiple people who were involved in the treatment of Claimant's injuries after the fall. Dep. at 76. He explained further that the fact that different people take histories does not make them unreliable. Dep. at 81. Dr. Chapa is comfortable relying on the findings of his physician assistant's and rendering care and opinions based upon their examination findings. Dep. at 82.

In Dr. Chapa's opinion, given the absence of any complaint of elbow pain until March 18, 2003, and the presence of the moveable deformity which was diagnosed as a small cyst, the left elbow deformity is not related to the February 11, accident at work. Dep. at 29. Further, considering Claimant's injury history, the results of an examination of the elbow, an x-ray, Claimant's pain symptom history, and the MRI, Dr. Chapa ruled out not only any connection between the loose body and the fall, pg. 77, but any causal connection between the elbow fracture and the fall. Dep. at 33, 77.

Discussion

The issues presented for adjudication in this matter are fairly discrete. The parties disagree over the correct average weekly wage which should be used to calculate Claimant's benefits during a period of temporary total disability, whether Dr. Chapa was Claimant's physician of choice, and whether Claimant's fractured left elbow is a work-related injury. We turn first to Claimant's argument that benefits paid by Employer were based upon an incorrect average weekly wage calculation.

Average Weekly Wage

Initially the determination of Claimant's average weekly wage (AWW) would appear rather straight forward. The parties agree that his average weekly wage should be calculated under Section 10(c) of the Act. They further agree that in the year prior to his injury, Claimant worked 34 weeks for the Employer and earned ILA wages totaling $42,563.91, including vacation and holiday pay and container royalties. Employer, however, determined that Claimant's average weekly wage is $818.54 by dividing his ILA wages by 52, while Claimant insists that his average weekly wage is $1,251.87, which he calculated by dividing his ILA earnings by 34, the number of weeks he worked. Claimant argues, alternatively, that if a divisor of 52 is used, then his earnings should include income derived from non-longshore sources, specifically $27,000.00 reflected in

his 2003 tax return as earnings from self-employment at Early and Al's, thus increasing his adjusted gross wages to $69,563.91, and his average weekly wage to $1,337.77. *See*, Cl. Br. at 18-19.[1] Employer responds that it would be unfair to inflate "his annual earning capacity by increasing his compensation rate based on the period of time that he was not working or earning wages from the employer." Emp. Br. at 22 (emphasis in original). For the reasons which follow, I conclude that Section 10(c) is the appropriate statutory provision to apply in this instance, but neither party has correctly determined Claimant's average weekly wage.

The Appropriate Divisor is 52

Arguing that the 34 weeks he worked provides the proper divisor in calculating his AWW, Claimant cites several appellate cases which employ the actual number of weeks worked as the appropriate divisor when calculating AWW. Yet each of the cases Claimant cites is distinguishable from the situation here. What the case law demonstrates is the willingness of the courts to make adjustments in the gross earnings divisor when the number of weeks worked annually are reduced by circumstances, such as lay-offs, strikes, or injury, which are essentially beyond a claimant's control. Hawthorne v. Director, 884 F.2d 318 (6th Cir. 1988) (divisor 52 after adding back earnings lost during weeks on strike); Staftex Staffing v. Director, 34 BRBS 444 (5th Cir. 2000) (divisor 27); Flanagan Stevedore v. Gallagher 219 F.3d 426 (5th Cir.2000) (divisor 48); *See also*, Bath Iron Works Corp. v. Preston, 380 F.3d 597, (1st Cir. 2004) (divisor 31); Curtis v. Atlantic Marine Inc., 2004 LHC 1609 (May 16, 2004)(divisor 46); Brien v. Precision Valve/Bayley Marine, 23 BRBS 207 (1990). (injury). As the court observed in Tri-state Terminals, Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979): "since the underlying purpose of Section 10 (c) is to arrive at an accurate assessment of a claimant's actual earning capacity, it is important to consider other factors such as an employee's ability, willingness, and opportunity to work." Consequently, before adjusting a Section 10(c) calculation by a divisor of less than 52, it is necessary to determine why Claimant worked fewer than 52 weeks prior to the injury.

Claimant's Unavailability for Work

The record shows that in the year prior to his accident, Claimant was off work from May 12, to June 9, 2002 for a vacation. He was also off from July 28, 2002, through October 27, 2002. Claimant denied that he took his vacation during

[1] Pursuant to a conference call and letter dated April 18, 2006, the briefing period was re-opened until April 26, 2006, to afford Claimant an opportunity to comment in respect to Employer's exhibit 1. Claimant's Supplemental Post-hearing Brief was timely filed.

this period and testified that, during this period, he always showed up for work and presented to the bench; but he was bumped by senior co-workers from his Container Maintenance job. While pay records fail to reflect the reasons Claimant missed work, other evidence suggests that Claimant's insistence that he was consistently available for work and presented to the bench is not entirely credible.[2]

Fred Wakefield, a member of the Executive Board of Local 1408 testified that the union maintains a daily sign-in log, or book, that keeps track of members of who report to the bench to work each day. Pg. 9-10. According to Wakefield, it shows: "anyone that made themselves available…. If there is no work, it logs that they were there seeking work." He testified that: "The members that are available are the ones that signed."

Wakefield explained that members may have worked who did not sign in, for example, if they received a referral or if the labor order called for the dispatch of everyone on the bench; but if more members presented to the bench than the labor orders called for, the book shows the members who were available. Thus, the book would show if Claimant were bumped by senior co-workers. In response to questions by Claimant's counsel, Wakefield did acknowledge that it is possible that a worker who was available did not sign in because he called the union hall was told that no work was available; however, this line of questioning was contrary to Claimant's own testimony that he did present to the bench as was bumped. Moreover, in Wakefield's opinion, workers who call in should still show up and sign in because employers can submit labor orders during the day. Thus, for the period, July through October 2002, Claimant had a gap in his employment when he did not present to the bench and sign-in, and while the union book does not show the reason he failed to sign in, Wakefield testified that by not signing the log Claimant was not making himself available.

Considering the record as a whole, Claimant's testimony that he was available for work and presented to the bench, but was bumped by senior co-workers on days he failed to sign in is not credible. Further, since Claimant's contention that he was bumped by senior co-workers lacks credibility, it follows that the precedents involving lay-offs and similar circumstances, such as Curtis v. Atlantic Marine, *supra*, are distinguishable.

[2] Claimant's credibility and the credibility of other witnesses will be assessed in several instances, and each time credibility is in issue, it will be evaluated in context upon consideration of the record as a whole. Consequently, some aspects of Claimant's testimony may lack credibility while his testimony on other issues may be entirely credibility.

The authorities Claimant invokes to increase his average weekly wage by dividing his annual earnings by the number of weeks he actually worked at Container Maintenance are inapplicable. The union logbook shows that, contrary to his testimony, Claimant did not present to the bench for twelve weeks; and by not signing in for twelve weeks Claimant rendered himself unavailable for work. He has thus failed to demonstrate that he was out of work for reasons beyond his control and has thus failed to establish an element prerequisite to the AWW adjustment he demands. Tri-State Terminals v. Jesse, 596 F.2d 752 (7th Cir. 1979); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986); Jackson v. Potomac temporaries, Inc., 12 BRBS 410 (1980). Under these circumstances, fifty-two is the proper divisor for calculating Claimant's AWW.

Annual Earnings

The record shows that Claimant earned $42,563.91, including vacation and holiday pay and container royalties, during the 34 weeks he worked for the Employer in the year preceding the accident. In the Employer's view, Claimant's ILA income should be the only earnings used to calculate his AWW and argues that it would be unfair to inflate earnings based on a period of time that he was not working for the Employer. The courts and the Board have addressed this issue.

It is well-settled in the case law that an injured longshoreman's annual earnings are not limited to his ILA earnings for purposes of calculating his pre-injury AWW. In Lobus v. I.T.O. Corp. of Baltimore, Inc., 24 BRBS 137 (1990), for example, the Board included earnings from a longshoreman's part-time job as a real estate agent. A year later, the Board held in Wayland v. Moore Dry Dock, 25 BRBS 53 (1991), that all sources of a claimant's income, including commissions earned while self-employed, are to be included in the average weekly wage. *See also,* Wilson v. Norfolk & Western Railway Co., 32 BRBS 57 (1998), rev'd mem., 7 Fed. Appx. 156 (4th Cir. 2001)(income derived from a part-time job included); Harper v. Office Mover's, 19 BRBS 128 (1986); Wise v. Horace Allen Excavating Co., 7 BRBS 1052 (1978). Obviously, then, Claimant's non-longshore earnings must be included in his AWW calculation.

As noted above, Claimant's 2002, ILA earnings totaled $42,563.91. The record also contains Claimant's 2003 tax return, Schedule C, which shows that Early and Als' had gross receipts totaling $27,498, for the 12 month period from January 1, 2003 through December 31, 2003, and Claimant argues that $27,000 should, therefore, be added to his annual earnings.

Claimant, however, is mistaken for, at least, three reasons. First, he was injured on February 11, 2003, and the Board has held that post-injury events are not generally relevant to average weekly wage determinations. Simonds v. Pittman Mechanical Contractors, Inc., 27 BRBS 120 (1993), aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, 35 F.3d 122, (4th Cir. 1994). Consequently, only earnings prior to February 11, 2003, would be included in an AWW calculation. Second, Claimant seeks to add the gross receipts of Early and Al's as shown on his 2003 Schedule C. Yet, the Board has held that only a Claimant's net earnings may be used in arriving at an AWW under Section 10(c). Wayland v. Moore Dry Dock, 25 BRBS 53 (1991). Claimant's net business income as shown on Line 12 of his 2003 Form 1040, however, shows income of $12,580. Finally, Claimant adduced no evidence which establishes either Early and Al's 2002 gross receipts or Claimant's net earnings from Early and Al's in 2002. Consequently, the addition of $27,000 to annual earnings, as Claimant urges, reflects gross receipts for a 10 ½ month period post-injury and is not justified.

The question under Section 10(c) then is how to arrive at a reasonable estimate of Claimant's 52-week pre-injury annual non-longshore earnings in the absence of direct evidence of its total. Claimant was injured on Tuesday, February 11, 2003. The record shows that there were many weeks when Claimant did not work at Early and Al's, many weeks when the business was shut down, and some weeks when it operated with part-time help in Claimant's absence. The record does not show the specific days or weeks Claimant worked at Early and Al's, but it does show that his non-longshore 2003 net taxable earnings totaled $12,580.00. Since no other data is available which shows actual weekly non-longshore earnings or which would permit a more accurate calculation, I believe, under these circumstances, that the goal of Section 10(c) is best implemented by dividing his annual 2003 non-longshore net earnings by 52 to determine an average pre-injury weekly total for non-longshore earnings prior to the date of injury on February 11, 2003. This amounts to $241.92. ($12,580÷52), for each week in 2003 prior to February 11, 2003.

The record further shows that while employed at Container Maintenance, Claimant worked intermittently; but it seems he spent about six months each year working sporadically at Early and Al's and six months intermittently each year at Container Maintenance. Indeed, it appears that Early and Al's was a viable concern in 2002, particularly when Claimant was available to devote his skill and labor to the venture. Under these circumstances, it seems reasonable, in view of what seems to be Claimant's fairly consistent pattern of splitting his longshore and non-longshore work to achieve his ultimate retirement goals, to adopt his pre-injury

2003 average weekly non-longshore net earnings prior to February 11, 2003, as determined above, and apply it as his 52-week pre-injury net non-longshore earnings, based upon the rationale that he worked about as much at Early and Al's in 2002 as he did in 2003. The result amounts to $241.92 per week for the period February 11, 2002, to February 10, 2003, totaling $12,580.00.

This estimate, formulated under Section 10(c), and based upon the record considered as a whole, seems the fairest assessment permitted by the evidence adduced by the parties. Empire United Stevedores v. Gatlin, 936 F.2d 819(5th Cir. 1991); Sproull v. Stevedoring Services of America, 25 BRBS 100 (1991). On average, then, I conclude that Claimant's 52-week pre-injury earnings, including his ILA and non-longshore earnings, total $55,143.91. ($42,563.91(longshore) + $12,580.00 (non-longshore)). As discussed above, the correct divisor is 52; and, therefore, Claimant's Section 10(c) average weekly wage is $1,060.46. Wayland v. Moore Dry Dock, 25 BRBS 53 (1991); Brien v. Bayley Marine, 23 BRBS 207 (1990).

Left Elbow Injury
Medical Bills and Treatment

The remaining issues in this proceeding relate to Claimant's left elbow. Employer contends that Claimant treated with Dr. Chapa for nearly two months without mentioning any problem with left elbow pain. Thereafter, Dr. Chapa examined and x-rayed the left elbow when Claimant did mention it, and he ruled out a causal connection between the accident and the left elbow fracture. Employer argues further that Claimant returned to work and did not ask the Employer to authorize another physician or to provide medical treatment for the elbow until he filed his claim on July 2, 2004. Claimant responds that he complained about his left arm from the outset. He testified that he mentioned it in the emergency room where he was initially taken for treatment and many times thereafter when he was asked about his injury and symptom histories by medical personnel in Dr. Chapa's office. He claims the Employer denied him treatment for his elbow when he requested it and denied him his choice of physician, forcing him to seek unauthorized medical treatment from Dr. Mella and the unauthorized MRI Dr. Mella recommended.

Section 20 Presumption

We begin this discussion by noting that the accident on February 11, 2003, involved a fall of about ten feet onto a concrete floor with Claimant landing on his

left side, lacerating his head, injuring his low back, and, according to Claimant, his left elbow. Although there is little, if any credible evidence that Claimant reported pain associated with his left elbow prior to April 10, 2003, the record shows that Dr. Chapa, Claimant's treating physician, did explore a left elbow complaint on that date and diagnosed a cyst. Subsequently, a July 3, 2003, MRI revealed a small, minimally displaced fracture of the tip of the coracoid process in the left elbow but no "loose body."

The courts have held that the Section 20(a) presumption is applicable to medical benefits. Jenkins v. Maryland Shipbuilding & Dry Dock Co., 6 BRBS 550 (1977), rev'd on other grounds, 594 F.2d 404, (4th Cir**.** 1979). Further, invocation of the presumption may be predicated upon credible testimony that an incident occurred or conditions existed at work that could have precipitated the injury. Conoco, Inc. v. Director, 33 BRBS 187 (CRT) (1999); Damiano v. Global Terminal & Container Service, 32 BRBS 261 (1998); Marinelli v. American Stevedoring, Ltd, 34 BRBS 112 (2000). In this instance, Claimant's ten foot fall onto a concrete floor striking his left side coupled with the MRI results are sufficient under the applicable case law to invoke the presumption that the fracture in his left elbow is causally related to the February 11, 2003 accident.

Rebuttal

Upon invocation of the presumption, it is Employer's burden within the jurisdiction of the Eleventh Circuit Court of Appeals, where this case arises, to rule out a causal relationship between Claimant's employment and the injury. Brown v. Jacksonville Shipyard, 893 F.2d 294 (11th Cir. 1990); *Contra*, Conoco v. Director, 194 F. 3d 684 (5th Cir. 1999) (requiring employer to go forward with substantial countervailing evidence to rebut the presumption). *See also*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd*, 892 F.2d 173, 23 BRBS 12 (CRT) (2d Cir. 1989). In determining whether Employer has ruled out a causal relationship between Claimant's employment and the injury, as required by Brown v. Jacksonville Shipyard, however, it is necessary to consider the entire record, not just substantial countervailing evidence that would tend to sever the causal nexus. Thus, it appears that the analysis required to rule out a work-related etiology is quite similar to the analysis required in other Circuits after the presumption has been triggered and rebutted. *See,* Del Vecchio v. Bowers, 196 U.S. 280 (1935). It would seem to require an analysis which takes into consideration the record evidence viewed in its entirety.

Claimant's Credibility

Crucial to any assessment of the etiology of Claimant's elbow condition, in this instance, is his pain complaints over time. Dr. Chapa, as noted above, described Claimant's reported elbow pain complaints as a key factor in his evaluation of whether those complaints were related to his accident at work. Before turning to the medical evidence, however, both the timing and nature of Claimant's subjective pain complaints must be established and his credibility in reporting his symptoms must be evaluated.

In its post-hearing brief, Employer undertakes the challenge of rebuttal by attempting to de-link Claimant's elbow pain symptoms from February 11, 2003 incident. Employer thus challenges Claimant's assertion that he reported his elbow pain to emergency room staff and to Dr. Chapa's assistants, and they simply failed to note his complaints. The record does show, as Dr. Chapa observed at his deposition, that many different medical staff employees, ranging from receptionists to physicians assistants in his office to physical therapists and medical staff and emergency room doctors at St. Lukes Hospital all failed over a eight-week period to record any complaint by Claimant about pain in his elbow.

To be sure, the record does not explain why emergency room records fail to mention Claimant's left elbow. It is, of course, possible that he failed to report elbow pain at the time either because he experienced no elbow problem or because his head and other injuries distracted him. It is also possible, however, that he did, as he testified, mention his elbow; but his head was bleeding profusely and was the focus of attention which distracted the hospital staff causing their failure to note his elbow complaint. Yet, the record also reflects that Claimant visited Dr. Chapa's office six times prior to April 10, 2003, and none of the reports of those visits mention any problem with the left elbow.

Claimant argues that Dr. Chapa's office acknowledged his complaint of elbow pain on March 18, 2003. He cites the facility's report of that date which states that he is ready to return to work, but also notes further that he "still" had a deformity in his left elbow and pain. At his deposition, Dr. Chapa explained that the report was prepared by the receptionist and his medical assistant, and he acknowledged that use of the word "still" in this context is ambiguous.

Claimant, however, misinterprets the March 18 report. It does not indicate, contrary to Claimant's interpretation, that Claimant was "still" reporting pain. As

Dr. Chapa testified, the deformity was noted by his assistant on March 18, but no pain was reported. Indeed, a review of the March 18, 2003 office notes reveals that the examiner specifically used the medical symbol "Ø," meaning none/no, to indicate that Claimant reported no pain. In context, then, the medical assistant's use of the word "still" is an indication that deformity itself was still present and not a finding new to the medical assistant, but it does not indicate that the any elbow pain was previously reported.

The record thus confirms Dr. Chapa's observation that the first time Claimant reported elbow pain was April 10, 2003, two months after the accident. By that time, over a dozen or more health care workers had engaged with Claimant and prepared notes and reports regarding his symptoms; yet I find no corroboration in the medical evidence to support Claimant's testimony that he reported his elbow pain once, let alone consistently and many times, prior to April 10, 2003.

Weighing Expert Opinion Evidence

The only medical evidence addressing the etiology of the cyst or the fracture in Claimant's left elbow was provided by Dr. Chapa, and he ruled out any causal link between the accident and the condition of Claimant's left elbow. To be sure, Dr. Mella ordered the MRI that detected the fracture, but he offered no opinion regarding the etiology of the condition. We, therefore, consider more closely the basis for Dr. Chapa's opinion.

In severing the causal nexus, Dr. Chapa reasoned that if an individual falls and fractures his elbow, it is very painful on the day of the injury, and, in his opinion, it would be notable by many people subsequently. In this instance, Dr. Chapa observed that there is a two-month gap between the accident and the first report of elbow pain, and this, he opined, is medically inconsistent with any connection between the February 11, 2003 accident and either the cyst or the fracture. Emphasizing the absence of any clinical evidence of an elbow injury, subjective or objective evidence of elbow injury, or history of elbow injury reported by any of the many people involved in Claimant's treatment for two months after the accident, Dr. Chapa reasoned that the MRI indicates that the fracture is a new injury. Indeed, Dr. Chapa testified that the history of Claimant's symptoms of elbow pain is incompatible with an injury, and particularly a fracture, at the time of the accident. Thus, he ruled out any connection between either the loose body or cyst and the fall or between the elbow fracture and the fall.

At the hearing and again in his post-hearing brief, Claimant challenged Dr. Chapa's opinion on the ground that Dr. Chapa was not really involved in his care or treatment and basically rendered opinions on information provided to him by the physician's assistants who actually examined and treated Claimant post-injury. The record confirms that Claimant's care was largely administered by physician's assistants under the supervision of Dr. Chapa, and that Dr. Chapa did rely heavily upon reports and examination results they prepared.

Yet, Claimant has demonstrated no medical or legal reason, in general, why a physician can not or should not employ physician assistants in the care and treatment of patients or rely upon their input regarding the patient's care on matters within their training, skill, and competence. The issue then is not whether the physician in rendering his opinion relied upon information generated by a physician's assistant, but whether the information is accurate and whether the medical opinion rendered is the opinion of the physician or the opinion of the physician's assistant.[3] In this instance, the opinion relied upon by the Employer is the opinion rendered by Dr. Chapa not the physician's assistant.

Moreover, contrary to Claimant's contentions, Dr. Chapa did not rely solely upon input from his staff. Claimant confirmed in testimony at the hearing that Dr. Chapa, a specialist in occupational medicine with a long history of treating patients with orthopedic problems, did examine his arm, and the record shows that Dr. Chapa personally reviewed an x-ray of Claimant's elbow and considered the MRI results. Consequently, it appears that Dr. Chapa's etiology assessment was predicated upon a comprehensive review Claimant's condition.[4]

Considering the foregoing factors, it appears that Dr. Chapa's etiology assessment that the accident did not cause the elbow condition is sufficiently documented to constitute a well-reasoned medical opinion, and his conclusion that MRI reveals a new fracture is not refuted by any other medical opinion in this record. Thus, considering Dr. Chapa's testimony reviewed in its entirety, it provides an adequate basis to rule out the February 11, 2003 accident as the cause

[3] In Mathis v. Southern Maintenance & Repair, 2005 LHC 320 (ALJ May 2, 2006) the etiology assessment of a physician's assistant was accorded less weight than the opinions rendered by the physicians who evaluated Mathis's condition. In contrast, while Dr. Chapa relied heavily upon the examinations performed by his assistant's and the histories they reported; Dr. Chapa, not his assistants, rendered the opinion regarding the etiology of Claimant's elbow condition.

[4] It may also be noted that the x-ray revealed a small loose body in Claimant's elbow that Dr. Chapa diagnosed as a cyst. The x-ray, as interpreted, revealed no fracture at the tip of coracoid process. The MRI showed the small fracture in the elbow, but no loose body. Comparing the x-ray report with the MRI report suggests that the fracture may have occurred subsequent to the x-ray, but this is a medical issue relevant to an etiology assessment, and this record fails to address it.

of Claimant's left elbow condition within the meaning of Brown v. Jacksonville Shipyard. Accordingly, I conclude that Employer has rebutted the presumption set forth in Section 20 of the Act.

Choice of Physician
Choice of Physician Form

Claimant protests, however, that he was deprived of an opportunity to consult with a specialist. He testified that shortly after the accident he was asked by the carrier's claims adjuster to sign a blank form which was later filled in by someone else designating Dr. Chapa as his physician of choice. Claimant contends that he initially sought treatment from Dr. Chapa because he thought he had no other choice, and when he finally sought treatment for his elbow; the Employer refused to provide it forcing Claimant to consult with a physician on his own and subsequently undergo an unauthorized MRI which revealed the fracture in his elbow. Employer responds that the Choice of Physician form designating Dr. Chapa as Claimant's physician is signed by Claimant, he treated with Dr. Chapa without objection from February 12, 2003 to April 24, 2003, Claimant did not request a change of physician before he underwent the MRI, and Dr. Chapa ruled out Claimant's accident at work as the cause of his elbow fracture. Employer, therefore, asserts that Claimant is entitled to no medical benefits for the elbow injury.

Employer contends that Claimant has been treated by his physician of choice. Yet, Claimant testified credibly that the claims adjuster assigned to his case approached him shortly after his accident with a number of different forms, one of which was the Choice of Physician form. Claimant testified that he had not previously heard of Dr. Chapa and knew no one who treated with him. He acknowledged that the signature on the form is his; but he testified that, at the time he signed it, the form was blank, and Dr. Chapa's name was filled in by someone else at a later date.

The carrier's adjuster assigned to Claimant's case testified that typically the choice of physician form is not pre-filled out with the name of the doctor, but he did not recognize the handwriting that designated Dr. Chapa as the physician of choice. Although he believed the claim was handled properly, he acknowledged that his predecessor could have had Claimant sign the form in blank; and further acknowledged that Claimant's previous adjuster was no longer employed by the carrier due, in part, to "ineffective" handling of claims. Since Claimant testified credibly that the Choice of Physician form was blank when he signed it, and there

is no direct contradictory evidence otherwise, I conclude that the form was blank when Claimant signed it and someone else filled it in later. Yet, that does not end the inquiry.

Choice of Physician by Acquiescence

Although Claimant testified that he thought he had no choice but to treat with the doctor designated by the Employer, his testimony in this regard is less credible. While he may have initially thought he was required to see Dr. Chapa, he did consult with officials of his union local, and I find dubious his testimony that union officials were unfamiliar with the medical rights of injured longshoremen. Beyond that, however, the record shows that Claimant was satisfied with the treatment he received from Dr. Chapa. Under similar circumstances, the Board in Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364 (1994), aff'd. mem., 61 F.3d 900 (4th Cir. 1995), concluded that although the claimant was not initially permitted to select her own physician, the doctor she voluntarily treated with for two years, became her initial free choice. Claimant seeks to distinguish Hunt on the ground that the claimant in Hunt treated with the physician for two years in contrast with the eight or so weeks of treatment Claimant received from Dr. Chapa; yet, the apparent distinction does not vitiate the applicability of the principle articulated in Hunt.

The record shows that Dr. Chapa provided the full course of treatment required by Claimant's head and back injuries, and he evaluated Claimant's elbow complaints when they were brought to his attention. Indeed, Claimant expressed no dissatisfaction with the medical treatment he received from Dr. Chapa or anyone in his office. Thus, the duration of treatment depended on the nature of the injuries: in the Hunt case, two years; in Claimant's case about eight weeks to resolve his head and back injuries and evaluate his elbow pain. Eventually, both Hunt and Claimant decided that additional medical attention was needed, and both sought it; but as the Board in Hunt determined, the physician they treated with initially was still their free choice of physician and that did not change simply because the claimant in Hunt, like the Claimant here, later decided to seek another physician.

Absence of Request for Further Treatment

Claimant testified further, however, that he turned to his family doctor and eventually Dr. Mella only after he requested treatment for his elbow and the Employer denied it. For the reasons discussed below, this aspect of Claimant's testimony is not credible.

Although Claimant insisted that Employer denied him treatment for his elbow, the record shows that he never actually requested either further treatment or a change of physician. According to Claimant, Dr. Chapa was no longer authorized to treat him after he was released to return to work. Dr. Chapa, however, testified that after April 24, 2003, Claimant was authorized to return, but he simply did not return for follow-up visits. Similarly, Ray Nelson, Employer's general manager, denied any knowledge that Claimant had elbow complaints, was receiving treatment for his elbow, or was having any difficulty performing his job. In testimony that was highly credible, Nelson explained that after Claimant returned to work, Claimant never requested further medical treatment, and he had no knowledge that Claimant even wanted additional medical treatment until after Claimant's resignation. Nelson explained that he notifies the carrier of every request for medical treatment he receives, and again in testimony that was highly credible, he denied ever turning down request for medical treatment by Claimant.

Further, corroboration of Nelson's testimony is found elsewhere in the record. As noted above, Claimant testified that he asked the Employer to provide treatment for his elbow; however, in contradictory testimony, he also provided his rationale for not actually making such a request. He was concerned, he testified, that if he advised the company that he needed medical treatment after Dr. Chapa released him to return to work, disciplinary action would have been taken, and his goal at the time was simply to avoid problems and work long enough to secure his ILA retirement. Claimant thus provided his explanation for not requesting either a change of physician or further medical treatment, and, in so doing, essentially confirmed the testimony of Ray Nelson and Dr. Chapa that he did not request additional medical treatment.

Beyond that, the record further demonstrates that Claimant's concerns about disciplinary action were entirely unfounded. Nelson credibly denied that any disciplinary action is taken against any injured worker who seeks medical treatment, and the record contains no evidence to the contrary. Consequently, I find that Claimant did not ask for a change of physician and did not request further medical treatment for his elbow. Moreover, I conclude that his concerns about disciplinary action lacked a reasonable basis and were unjustified. If Claimant did not consult with an orthopedic or other specialist, it was not due to a denial of authorization by the Employer. It was simply due to Claimant's failure to pursue that course of action.

Medical Expenses Incurred
Prior to Request for Authorization

Section 7(d) of the Act addresses the issue of payment for medical expenses already incurred. In Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988), the Board held that once employer refuses to provide treatment or to satisfy claimant's request for treatment, employer is liable for any treatment claimant subsequently procures on his own initiative which was necessary for treatment of the work injury. *See also*, Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989). Mere knowledge of medical treatment by an employer or carrier does not create an obligation to pay for it; claimant must first request treatment and obtain written authorization before a medical expense is compensable under Section 7(d). Parklands, Inc. v. Director, 877 F.2d 1030, (D.C. Cir. 1989).

In this instance, as discussed above, the record establishes that Claimant did not request further medical treatment for his elbow, and Employer had not denied further medical treatment at the time Claimant saw Dr. Mella or underwent the MRI examination. Under these circumstances, because Claimant failed to seek prior authorization, the expenses incurred by Claimant for the MRI must be denied. Ranks v. Bath Iron Works Corp., 22 BRBS 301 (1989); Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989).

Furthermore, Employer received no request for additional medical benefits from the time Claimant first reported elbow pain on April 10, 2003, until he filed his claim on July 2, 2004, and Employer denied neither a request for medical treatment of the elbow nor a request to change physician until August 13, 2004, when it controverted the claim, asserting that all benefits due have been paid. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989). As determined above, however, since Employer has rebutted the presumption that Claimant's elbow condition is causally related to the February 11, 2003 accident, Claimant is not entitled to any post-controversion care or treatment of this elbow condition.

Interest on Past Due Compensation

Finally, Claimant seeks interest and penalties on past due benefits. Claimant has neither explained nor briefed his claim of entitlement to penalties. His claim for interest, however, is automatic. Thus, the Board has held that interest under the Act on all unpaid accrued benefits is mandatory, and it is calculated on a simple, not compound, basis. Canty v. S.E.L. Maduro, 26 BRBS 147 (1992); Jones v. U.S.

Steel Corp., 25 BRBS 355 (1992); Smith v. Ingalls Shipbuilding Division, Litton Systems Inc., 22 BRBS 46 (1989).

Accordingly;

ORDER

IT IS ORDERED that Employer pay Claimant compensation for temporary total disability for the period February 12, 2003 through March 25, 2003, based upon an average weekly wage of $1,060.46; provided however, that Employer shall be entitled to a credit for compensation benefits already paid during this period, and Claimant shall be paid interest on benefits due after the Employer's credit is taken, and;

IT IS FURTHER ORDERED that the claim for medical benefits for the care and treatment of Claimant's injured left elbow and medical costs associated with the MRI administered on July 3, 2003 be, and they hereby are, denied.

A

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Stuart A. Levin
Administrative law Judge